

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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February 24, 2004

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*IN RE Complaint of US LEC of Tennessee Inc)
against BellSouth Telecommunications, Inc)
For Failure to Comply with 47 U S C § 252(i),)
or, in the Alternative, Petition for Arbitration)
Pursuant to 47 U S C §252(b))*

Docket No 04-0006-3

**COMPLAINT, OR IN THE ALTERNATIVE, PETITION FOR ARBITRATION,
OF US LEC OF TENNESSEE INC. AGAINST BELL SOUTH
TELECOMMUNICATIONS, INC.**

Comes now US LEC of Tennessee Inc ("US LEC"), pursuant to T C A. §§ 65-4-104, 65-4-117, 65-5-208(c) and 65-5-210(a), and hereby files this Complaint against BellSouth Telecommunications, Inc ("BellSouth") and this Petition for Approval of § 252(i) Adoption of an Existing Interconnection Agreement and seeks the Authority to

- (a) compel BellSouth to comply with its obligations under 47 U S C §§ 251 and 252 and 47 C F R Section 51.809(a), and
- (b) require BellSouth to execute the Adoption Agreement attached hereto, as Attachment A ("Adoption Agreement"), and
- (c) approve US LEC's § 252(i) adoption of the interconnection agreement between BellSouth and Time Warner Telecom of Mid-South, L P dated January 23, 2003 ("Opt-In Agreement")¹

In the alternative, US LEC asks that this Complaint be treated as a Petition for Arbitration, pursuant to §252(b), and asks that the Authority convene an arbitration

¹ On file at the TRA, See Docket No 03-00190

proceeding to address the issue of whether US LEC may adopt the Time Warner interconnection agreement

In support hereof, US LEC states as follows

PARTIES

- 1 The name and address of the Petitioner are

US LEC of Tennessee Inc
Morrocroft III
6801 Morrison Boulevard
Charlotte, NC 28211

- 2 All pleadings, documents, correspondence, notices, staff recommendations and orders filed, served or issued in this docket should be served on the following

Henry Walker
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, Tennessee 37219
(615) 252-2363

with copies to

Terry J Romine
Deputy General Counsel – Regulatory
US LEC Corp
Morrocroft III
6801 Morrison Boulevard
Charlotte, NC 28211

and

Wanda G Montano
Vice President, Regulatory and Industry Affairs
US LEC Corp
Morrocroft III
6801 Morrison Boulevard
Charlotte, NC 28211

3 BellSouth is an incumbent local exchange carrier (ILEC) providing telecommunications services in Tennessee. BellSouth's official business address is

BellSouth Telecommunications, Inc
333 Commerce Street
Nashville, TN 37204

FACTUAL BACKGROUND

4 BellSouth and US LEC entered into an interconnection agreement ("Existing ICA") effective as of January 1, 2000. The Authority issued an Order approving the adoption of the Existing ICA on June 8, 2001 (Docket 01-00282).

5 The Existing ICA term expired on December 31, 2003, however, until the Subsequent Agreement becomes effective, the parties shall continue to exchange traffic pursuant to the terms and conditions of the Existing ICA (Existing ICA, Section 1.3). The Subsequent Agreement is deemed to be effective retroactive to the day following the expiration date of the Existing ICA (Existing ICA, Section 1.3).

6 The parties have engaged in negotiations, deemed to have begun as of July 4, 2003, but have been unable to arrive at a new interconnection agreement. By mutual consent, the parties have extended the current agreement, as well as the period for filing an arbitration petition, through February 28, 2004. The relevant events related to the negotiations are summarized below:

- a On August 21, 2003, US LEC forwarded to BellSouth an agreement, executed by US LEC, in which the parties agreed to adopt the Opt-In Agreement in whole, except for a request to revise the language in Attachment 3, paragraph 7.6.2 ("7.6.2 Language").
- b On September 3, 2003, BellSouth notified US LEC that the requested

revision to Attachment 3, paragraph 7 6 2 was not acceptable, and it would not sign the adoption agreement

- c On September 19, 2003, BellSouth sent US LEC a revised Adoption Agreement omitting the 7 6 2 Language
- d On October 8, 2003, US LEC issued to Bellsouth a Bona Fide Request (“BFR”) to negotiate an amendment to the Existing ICA in recognition of the change of law provisions within the Existing ICA and the adoption by the Federal Communications Commission of its Triennial Review Order (“FCC’s TRO”) New or revised rules affecting access to unbundled network elements (“UNEs”) from BellSouth, as adopted in the FCC’s TRO, became effective October 2, 2003
- e On October 23, 2003, US LEC forwarded to BellSouth a proposed amendment to Attachment 2 of the Existing Agreement that reflected the new or revised FCC rules affecting UNEs (“US LEC’s TRO Amendment”)
- f On October 24, 2003, BellSouth acknowledged receipt of the BFR and advised US LEC that BellSouth would provide US LEC with the amendment for its review within the next few days (“BellSouth TRO Amendment”) BellSouth also advised US LEC that the adoption papers would be modified to incorporate the FCC’s TRO language
- g On November 5, 2003, BellSouth acknowledged receipt of the US LEC’s TRO Amendment
- h On November 19, 2003, BellSouth and US LEC met to discuss the

interconnection adoption issues, among other issues BellSouth agreed to provide US LEC with a proposed BellSouth TRO Amendment within two weeks of the meeting, and US LEC agreed to extend the expiration of the Existing ICA and negotiations of the Subsequent Agreement for 60 days from the expiration date of the Existing ICA

i On December 9, 2003, US LEC had not received the promised BellSouth TRO Amendment and queried BellSouth on the status of that document

j On December 12, 2003, BellSouth forwarded an ICG contract to be used as a template for the states of Alabama and Louisiana Included in the package were templates for Attachments 2 and 6 to the BellSouth template interconnection agreement that allegedly incorporated the FCC's TRO language BellSouth stated that the parties would negotiate the Attachments and would use such negotiated Attachments as the TRO Amendment to the Subsequent Agreement

k US LEC reviewed the two Attachments and determined that not only did BellSouth revise the attachments to reflect its one-sided interpretation of the FCC's TRO on the access to its unbundled network elements, but BellSouth also had taken the opportunity to make changes to other terms and conditions of its standard template agreement that had not even been discussed in, let alone impacted by, the TRO

l With the expiration date of the negotiation period and the expiration date of the Existing ICA fast approaching, on February 4, 2004, US LEC again forwarded BellSouth an adoption agreement that reflected that parties'

agreement that US LEC could adopt the Opt-in Agreement, and acknowledged that the parties would continue to negotiate the TRO Amendment to the Subsequent Agreement (“US LEC Adoption Agreement”) US LEC executed the US LEC Adoption Agreement prior to forwarding it to BellSouth US LEC asked BellSouth to execute the US LEC Adoption Agreement and return it to US LEC by February 9, 2004 for filing with the Authority, and asked BellSouth to confirm that it would take these steps

- m On February 6, 2004, BellSouth advised US LEC that, contrary to prior representations, it had not agreed to extend the termination date of the Existing ICA, but only to extend the negotiation window 60 days past the expiration date of the Existing ICA to negotiate the TRO Amendment
- n On February 9, 2004, US LEC asked BellSouth to execute the adoption agreement, which BellSouth had provided to US LEC on September 19, 2003, wherein US LEC agreed to adopt all rates, terms and conditions of the Opt-In Agreement, including amendments thereto BellSouth declined on the basis that it would no longer make available the approved Opt-In Agreement without its version of a TRO Amendment which, as shown, went far beyond the scope of the FCC’s TRO itself

DISCUSSION

Complaint:

- 7 Section 252(i) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“Act”), provides that

A local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement

8 47 C.F.R. § 51.809(a) of the FCC's rules states that

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement

9 The BellSouth/Time Warner Agreement, which US LEC wishes to adopt, is an agreement to which BellSouth is a party, and it contains the terms and conditions for individual interconnection, service or network element arrangements that US LEC has asked to be made available to it under §252(i). The agreement has been approved by the Authority² and has not expired. US LEC submits that the Opt-In Agreement is available for election by US LEC to adopt, and BellSouth must make it available without any further delay.

10 BellSouth asserts that US LEC may not adopt the Opt-In Agreement until the parties have negotiated a TRO Amendment. BellSouth asserts that, unless and until US LEC enters into its version of a TRO Amendment, the Opt-In Agreement is not available because US LEC failed to avail itself of the arrangements within a reasonable period of time after the Opt-In Agreement was made available for public inspection. BellSouth's position ignores the fact that (a) the Opt-in Agreement was not approved until May 2003, (b) US LEC requested to adopt the Opt-In Agreement in August 2003, and (c) the overwhelming majority of the terms and conditions of the Opt-In Agreement are not

² See Docket 03-00190, *Order* (May 30, 2003)

affected by the revised rules adopted in the FCC's TRO BellSouth's placement of conditions on its obligation to permit US LEC to adopt a current interconnection agreement under Section 252(1) is contrary to the Act and the FCC's rules

11 Nor did US LEC have notice, when BellSouth forwarded the Adoption Agreement to US LEC for signature on September 19, 2003, that the ability to adopt the Opt-In Agreement would expire on October 2, 2003, unless US LEC agreed to enter into an amendment to the agreement By September 19, 2003, BellSouth was well aware that the TRO rule revisions would be effective on October 2, 2003 At no time until January 2004 did BellSouth assert its position that the "reasonable period of time" had expired and the Opt-In Agreement was not available, unless and until a TRO Amendment was negotiated and executed US LEC agrees that an amendment is necessary, but has been proceeding with negotiations of that Amendment on the basis that BellSouth was making the Opt-In Agreement available, and that both parties wanted to concurrently negotiate the TRO Amendment

12 Moreover, BellSouth was not even prepared to initiate negotiations of a TRO Amendment on October 2, 2003 US LEC's TRO Amendment was provided to BellSouth on October 23, 2003 BellSouth acknowledged receipt of the amendment, but apparently did not even consider US LEC's proposal, responding instead that it would provide its own proposed amendment As of November 19, 2003, BellSouth had no TRO Amendment proposal that it was willing to negotiate And as of December 9, 2004, BellSouth still had no TRO Amendment proposal that it was willing to negotiate Indeed, it was not until December 12, 2003, more than 60 days after the effective date of the

FCC's TRO rules and less than 20 days before the Existing Agreement would expire, that BellSouth finally provided template Attachments 2 and 6 for US LEC to consider

13 US LEC immediately reviewed the Attachments and found that the Attachments were not revised solely to meet the changes based on the FCC's TRO Amendment. Rather, sensing perhaps an opportunity to change other terms and conditions of the Opt-In Agreement that it no longer liked, BellSouth had changed other terms and conditions that differed from the same Attachments to the Opt-In Agreement, but were not impacted in the slightest by the FCC's TRO Amendment. Thus, BellSouth's argument that it would not allow US LEC to adopt the Opt-In Agreement until the parties negotiated a TRO Amendment is completely inconsistent with the wholesale changes made to its proffered Attachments.

14 To add insult to injury, on February 11, 2004, BellSouth filed a Petition for Waiver with the Federal Communications Commission seeking a waiver of the requirement to process orders under the revised commingling and service eligibility requirements ("EEL requirement"). BellSouth claims that the "contract negotiation process has proceeded much faster in its region than anticipated in the TRO," and that it does not wish to implement the one change to the FCC's rules that has a potential adverse economic impact on BellSouth: the EEL Requirements. Nevertheless, it is preventing US LEC from adopting the Opt-In Agreement because US LEC has not signed BellSouth's overly expansive TRO Amendment, which apparently BellSouth does not want to effectuate anyway. US LEC, therefore, argues that BellSouth will not be harmed by permitting US LEC to adopt the Opt-In Agreement while the parties continue to negotiate a TRO Amendment that truly addresses the specific changes found in the

FCC's TRO Order and leaves untouched the other terms and conditions of the Opt-In Agreement

15 US LEC submits that BellSouth has delayed unreasonably US LEC's ability to adopt the Opt-In Agreement to US LEC's detriment US LEC has been engaged in discussions and negotiations since August 2003 to adopt the Opt-In Agreement BellSouth's position is no more than a ruse to avoid its obligations under the Act and the FCC's rules, and to force US LEC to submit to terms and conditions in Attachments 2 and 6 that (a) are not consistent with the rules adopted in the FCC's TRO Amendment or (b) differ materially from the same terms and conditions in the attachments to the Opt-In Agreements, even though such terms and conditions were not affected by the FCC's TRO Order

16 Attachment A, which is attached and is incorporated by reference hereto, is the adoption agreement offered by BellSouth on September 19, 2003, which makes the Opt-In Agreement available to US LEC in its entirety Attachment A has been executed by US LEC US LEC asks that the Authority compel BellSouth to countersign the Adoption Agreement and to take such action as is necessary to approve the Adoption Agreement

Petition For Arbitration:

17 In support of US LEC's Petition for Arbitration, US LEC adopts, as set out above, paragraphs 1-16

18 As stated above, Section 252(i) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and 47 C F R §51.809(a) provide that US LEC is entitled to adopt the Time Warner Agreement

19 Even though the Time Warner agreement is a three-year agreement, which was not approved until May 30, 2003, it is BellSouth's position that US LEC is not entitled to adopt the agreement because US LEC did not pursue adoption within a "reasonable period of time" as required by 47 C F R §51.809 (c).

20 Although the Time Warner agreement does not address the FCC's rulings in the TRO, the agreement does include a change-of-law provision which requires the parties to amend the agreement to make it conform to "any regulatory action [which] materially affects any material terms of this Agreement." General Terms and Conditions, Section 14.3. The provision states in full:

In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TWTC [Time Warner] or BellSouth to perform any material terms of this Agreement, TWTC or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

Under the "Dispute Resolution" provision of the agreement, Section 10, either party may petition the Authority for relief if the parties are unable to agree. Thus, US LEC may adopt the Time Warner agreement and then negotiate with BellSouth language regarding the TRO. If the parties are unable to agree, either may then ask the Authority to settle the matter.

CONCLUSION

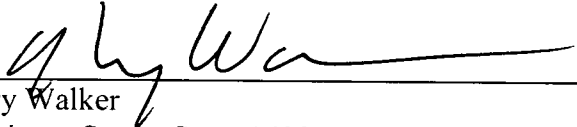
This complaint, and in the alternative, petition for arbitration, addresses one issue: whether US LEC may adopt the Time Warner interconnection agreement. BellSouth has no legal basis upon which to deny US LEC's request. Therefore, US LEC asks that the

Authority investigate US LEC's complaint, or in the alternative, convene an arbitration proceeding. Regardless of which action the Authority chooses to take, US LEC respectfully requests the Authority to direct BellSouth to allow US LEC to adopt the Time Warner agreement.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By


Henry Walker
414 Union Street, Suite 1600
P O Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded electronically on this the 24 day of February, 2004 to the following

Guy Hicks
BellSouth Telecommunications, Inc
333 Commerce St
Nashville, Tennessee 37201-3300



Henry Walker

BellSouth / CLEC Agreement

Customer Name: US LEC of Tennessee Inc.

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Note This page is not part of the actual signed contract/amendment, but is present for record keeping purposes only

By and Between
BellSouth Telecommunications, Inc.
And
US LEC of Tennessee Inc.

AGREEMENT**by and between**

**BellSouth Telecommunications, Inc. and US LEC of Tennessee Inc.
to Adopt Interconnection Agreement by and between
BellSouth Telecommunications, Inc. and Time Warner Telecom of Mid-South,
L.P. Dated January 23, 2003**

This Agreement, which shall be deemed effective thirty business days following the date of the last signature of both Parties ("Effective Date"), is entered into by and between US LEC of Tennessee Inc. ("US LEC"), a Delaware corporation on behalf of itself and its successors and assigns, and BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, having an office at 675 W. Peachtree Street, Atlanta, Georgia, 30375, on behalf of itself and its successors and assigns.

WHEREAS, the Telecommunications Act of 1996 (the "Act") was signed into law on February 8, 1996; and

WHEREAS, section 252(i) of the Act requires BellSouth to make available any interconnection, service, or network element provided under an agreement approved by the appropriate state regulatory body to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement in its entirety; and

WHEREAS, US LEC has requested that BellSouth make available the interconnection agreement in its entirety executed between BellSouth and Time Warner Telecom of Mid-South, L.P. dated January 23, 2003 for the states of Mississippi and Tennessee.

NOW, THEREFORE, in consideration of the promises and mutual covenants of this Agreement, US LEC and BellSouth hereby agree as follows:

1. US LEC and BellSouth shall adopt in its entirety the TWTC Interconnection Agreement dated January 23, 2003, and any and all amendments to said agreement executed and approved by the appropriate state regulatory commission as of the date of the execution of this Agreement. The TWTC Interconnection Agreement and all amendments are attached hereto as Exhibit 1 and incorporated herein by this reference. The adoption of this agreement with amendment(s) consists of the following:

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9/19/03

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2. In the event that US LEC consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of US LEC under this Agreement.
3. The term of this Agreement shall be from the effective date as set forth above and shall expire as set forth in Section 2.1 of the TWTC Interconnection Agreement.
4. US LEC shall accept and incorporate any amendments to TWTC Interconnection Agreement executed as a result of any judicial, regulatory, or legislative action.
5. Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, address to:

BellSouth Telecommunications, Inc.

CLEC Account Team
 9th Floor
 600 North 19 Street
 Birmingham, Alabama 35203
 and

9/19/03

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

US LEC

General Counsel
US LEC of Tennessee Inc.
6801 Morrison Blvd.
Charlotte, NC 28211

With a copy to:

Vice President, Regulatory & Industry Affairs
US LEC of Tennessee Inc.
6801 Morrison Blvd.
Charlotte, NC 28211

or at such other address as the intended recipient previously shall have designated by written notice to the other Party. Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mail.

6. Billing information and data contained on paper for payment shall be sent to the Parties at the following locations.

To US LEC:
US LEC of Tennessee Inc.
6801 Morrison Blvd.
Charlotte, NC 28211
ATTN: Accounts Payable

9/19/03

US LEC Adoption Papers - TN

IN WITNESS WHEREOF, the Parties have executed this Agreement through their authorized representatives.

BellSouth Telecommunications, Inc

By: _____

Name: Patrick C. Finlen

Title: Assistant Director

Date: _____

US LEC of Tennessee Inc.

By: Wanda G Montano

Name: Wanda G. Montano

Title: Vice President

Date: Feb. 10, 2004